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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 301

SAMUEL W. LAMBERT, APPELLANT

v.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION Director, David H. Blair, as Commissioner of Internal Revenue, and Emory R. Buckner, as United States Attorney for the Southern District of New York

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

OPINIONS OF THE COURTS BELOW

The opinion of the District Court (R. 12) will be found reported in 291 Fed. 640, and that of the Circuit Court of Appeals (R. 21) in 4 F. (2d) 915.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on the 25th or 26th of December, 1924. (R. 33.) Appellant appeals to this Court under the provisions of Sections 128 and 241, Judicial Code, as

those sections stood prior to the Amendment of February 13, 1925 (Ch. 229, 43 Stat. 936). The appeal was allowed February 6, 1925. (R. 34.)

STATEMENT

An injunction was issued by the District Court for the Southern District of New York upon the prayer of appellant, a physician of admitted standing and experience in New York City, enjoining the Commissioner of Internal Revenue and others from enforcing such portions of Section 7 of Title II of the National Prohibition Act of October 28, 1919, Ch. 85, 41 Stat. 305, and the Act supplemental thereto (Act of November 23, 1921, Ch. 134, 42 Stat. 222) as limit the quantity of intoxicating liquor which he as a physician might prescribe, on the grounds that said Acts were to such extent unconstitutional, unreasonable, and arbitrary legislation unauthorized by the Eighteenth Amendment to the Constitution. The Circuit Court of Appeals for the Second Circuit reversed the decree of the District Court and directed a dismissal of appellant's bill (R. 33), holding that the restriction upon physicians as to the amount of spirituous and vinous liquors which they may prescribe within a given time is appropriate legislation within the meaning of the Eighteenth Amendment, whereupon complainant appealed to this Court.

STATUTES INVOLVED

The National Prohibition Act and the Act supplemental thereto limit the quantity of liquor a physician may prescribe for one patient within any ten-day

period to one pint of spirituous liquor or one quart of vinous liquor, or in case of a combination of the two not more than a total of one-half pint of alcoholic content. The two sections of law follow.

Section 7, Title II, of the National Prohibition Act, of which complaint is made, reads in part as follows:

No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

Section 2 of the Supplemental Act reads, in part:

That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of the National Prohibition Act.

QUESTION PRESENTED

The question, simply stated, is whether Congress, while conceding the therapeutic use of alcoholic liquor, was acting within constitutional bounds in limiting the amount thereof which a physician could prescribe.

ARGUMENT**SUMMARY**

The limitation upon a physician administering the best remedy, according to his judgment, of which appellant complains, is largely imaginary. Whisky and wine are administered for the drug effect in the alcohol. Doctors are not limited in the use of alcohol in medicinal compounds. Many other unlimited administrations of liquors are permitted under the Act. The only actual restriction a physician suffers is when he would administer spirituous or vinous liquors in palatable beverage form. No showing has been made that the desired curative properties may not be administered in some of the ways permitted under the law.

Congress placed no greater restrictions on physicians in the medicinal use of liquor than it did on manufacturers in the industrial use of alcohol. Sacramental uses can not fairly be compared.

The limitation of one pint of spirituous liquor per patient per ten days was only placed by Congress after careful study of the scientific facts upon which the decision rested and a further study of the laws of the several States, experience in their enforcement, and the interpretation thereof given by State courts.

The right to practice medicine is not an inherent right. It may be restricted by proper exercise of the police power. This limitation upon physicians administering beverage liquor by prescription was a proper and necessary exercise of police power.

Legislative acts are presumed constitutional. The statutes here involved did not exceed the delegated powers of Congress under the Eighteenth Amendment.

I

THIS COURT HAS DECIDED THE CONTENTIONS HEREIN
BY ITS OPINION IN THE "BEER CASES"

Exactly the same sections of law, in so far as they refer to malt products, were before this Court in *Everard's Breweries v. Day*, 265 U. S. 545. Congress absolutely prohibited physicians from prescribing intoxicating malt liquors for medicinal purposes, which prohibition was attacked as unconstitutional. Several cases were joined. Briefs before the Court were voluminous. This appellant filed a 118-page brief as *amicus curiae*. The same arguments were urged then as are here again relied on, notably (a) complainant's right as a doctor to prescribe for his patients as he deems proper; (b) the alleged reserved power of the States to regulate the practice of medicine; and (c) the argument that the States ratified the Eighteenth Amendment because it did not prohibit, and therefore they did not delegate to the Federal Government power to prohibit, the use of intoxicating liquor as a medicine.

We observe in further comparison of the briefs in the instant case with those in the "Beer Cases" that reliance is placed on almost the same medical men's opinions on the "Valuation of alcohol and beer as therapeutic agents." Affidavits adduced in the earlier case painted even a more vivid picture of the

essential character of beer as a medicine than do those produced by complainant in the instant case to prove the necessity for prescribing to a patient more than one pint of beverage liquor in ten days. Affidavits of individual physicians and resolutions by medical associations, though proper subjects for congressional consideration when passing these laws or for urging changes therein, seem of doubtful propriety here, but in as much as they are discussed in both opinions below and so much relied upon by appellant, brief comment may not be out of place.

One hundred five physicians whose names are attached to the complaint appear in a resolution to go on record as believing that the limitation—apparently any limitation—"is a wholly unwarranted reflection upon the good faith of the American medical profession as a whole," but they seem carefully to avoid going on record as maintaining that it is ever necessary to prescribe more than a pint of beverage intoxicants within ten days. Dr. Lambert in his allegations is equally indefinite, for he only avers that he has "certain cases" under his observation in which it is his "opinion that the patient should use internally more than one pint of beverage liquor in ten days."

Many ways of treating a patient by the use of intoxicants in various forms are left open, in spite of the restriction of the law under attack in this case. Section 7 of the Act only prohibits prescribing the "tasty," habit-forming, "fit for beverage" liquors

to a patient for use in his home or elsewhere, as he may desire. No limitation is placed on the amount of liquor which a physician may order for a patient who is in a hospital. (Sec. 6, Title II, N. P. A.)

Nor is there any limitation whatsoever on the amount of alcohol which may be administered by a physician provided he compounds it with harmless bitters, herbs, or any of the substances well known to the medical profession that will destroy its essential character as a drink (as defined in Sec. 1, Title II, N. P. A.).

One of the circumstances listed by appellant as an instance wherein large quantities of beverage liquor should be administered is in treating a patient threatened with delirium tremens. No restriction is placed on the amount which may be given the patients confined in institutions for curing drunkenness. (Sec. 6, Title II, N. P. A.)

Medical preparations, many of which contain large proportions of intoxicating liquor, "manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy," that are not beverages may be furnished a patient in unlimited quantities. (Sec. 4, Title II, N. P. A.)

So also is there no limitation upon patent medicines, though their alcoholic content may be high. (Sec. 4, subdivision (c), Title II, N. P. A.)

Dr. Lambert, basing his complaint of unwarranted congressional interference with the practice of his

profession on such a loose and indefinite reference to "certain cases" that he has under observation which need more than a pint of liquor, fails to show that they are not inebriates in an institution, patients in a hospital, or that he can not prescribe for them the required amount of alcohol necessary, in his opinion, for their cure through one of the several other ways the law leaves open to him. As a matter of fact, most of the carefully constructed argument of appellant falls if its scope is whittled down, as it fairly must be, to just such cases as, in his best opinion as a physician, have to be treated by liquor which *tastes* like a beverage. Admittedly, the therapeutic value usually lies in the drug effect of the alcohol, and the physician is not restricted in administering that if he does so in any other than a palatable form. The underlying fallacy in most of the argument based on the opinions of physicians shown in the brief and appendix thereto of the appellant, and that of the American Medical Association as *amicus curiae*, lies in the failure to show that alcohol in some other than beverage form would not do as well as a curative as potable spirituous liquors, such as whisky and wine, or that whisky and wine may not be stripped of their beverage character by addition of some harmless ingredient.

A questionnaire was sent to one-third of the physicians of the United States. Fifty-eight per cent of them replied. Of the twenty-one and five-tenths per cent of the physicians of the United States, therefore, who gave an opinion, a little more than half—to be

exact, only ten and ninety-six hundredths per cent of the medical men of the country—voted “yes” on the use of whisky as a therapeutic agency. But some of this ten per cent voting in favor of whisky “take exception to the word ‘necessary,’ claiming that no drugs are absolutely necessary.” (Journal of American Medical Association, Jan. 21, 1922.)

We submit, therefore, that if Congress had had the benefit of the medical opinion collected by the questionnaire of the American Medical Association, it would have had no compelling reason not to have incorporated the restrictions in this law.

The limitation complained of is, therefore, mainly imaginary and applies only when the doctor keeps his patient outside a hospital and insists on prescribing the needed intoxicant in the potable uncamouflaged form of whisky, wine, or other beverage. There are no new contentions in all the arguments advanced by appellant which were not raised and considered by this Court in the “Beer Cases,” and we submit that if, as decided in that case, this Court found (265 U. S. 545, 563)—

no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of *prohibiting* prescriptions of intoxicating malt liquors for medicinal purposes. (Italics ours.)

much more forcibly may it be urged that Congress could properly *limit* the quantities of intoxicating beverages to be prescribed within stated periods.

THESE RESTRICTIONS ON PRESCRIBING WHISKY AND
WINE ARE "APPROPRIATE" LEGISLATION TO EN-
FORCE THE EIGHTEENTH AMENDMENT

(a) The three-fold problem before Congress

After ratification of the Eighteenth Amendment, Congress, faced with the duty of enacting legislation to carry the constitutional provision into effect, could quite plainly cover the entire field of beverage liquor; but that was not enough. Three general nonbeverage uses of liquor—sacramental, medicinal, and industrial—had to be considered, as each, if left unchecked, had possibilities of developing into a source of supply for law violation.

An argument of the American Medical Association, and the appellant herein, is that Congress has dealt unfairly by the doctors; that "on the rabbi, minister, priest, and manufacturer Congress imposed regulation" only, but on the physician a prohibition so arbitrary as to be inappropriate legislation and unconstitutional. The charge is made that Congress did this without reason or necessity therefor. Let us examine the facts. When legislating on industrial alcohol Congress was clearly outside the field of beverage liquor. It was dealing not with a drink but with raw alcohol, the ingredient or derivative of a beverage. Manifestly, Congress could not *prohibit* in such a field, but it could and did set up an elaborate system of inspection and regulation of the alcohol business under proper government

permits. (See Title III of the National Prohibition Act.)

On sacramental uses Congress conducted elaborate hearings. It was dealing here with a beverage, but in the form of wine, bulky and less easily diverted than hard liquors. Furthermore, in placing this wine in the hands of the clergy, Congress was releasing it through a channel having greater safeguards than the mere conscientiousness and reliability of the individual, to wit, the safeguard of the powerful church organization which, in matters of sacrament, would be likely to devote a watchful eye to prevent the reproach of lawlessness from attaching to its religious rites.

To guarantee properly the medicinal use of intoxicating liquors presented quite a different and a much more complex problem. First, the liquor handled would vary from alcohol, which when made unpalatable by compounding other ingredients, was left unrestricted in the quantities of it the physician may administer, to the plain, habit-forming beverages, such as whisky and the delicate liqueurs and wines largely desired by patients for their palatable and appetizing taste. In so far, therefore, as the physician uses alcohol, he is left in a more advantageous position than the manufacturer. In fact he professionally is in an unrestricted field. But when he chooses to use alcohol in its beverage forms, he must place himself under the restrictions and prohibitions Congress has found reasonably necessary to make effective the prohibition of the traffic in beverage liquors.

(b) Congress investigated the facts

Committees of Congress conducted exhaustive hearings both at the time of the passage of the original Prohibition Act and during the summer and fall of 1921 when the Supplemental Act was before it, and the facts adduced were ample to support the legislation. (Congressional Record, 67th Cong., 1st Sess., Vol. 61, pp. 3094-3135, 3454-3461, 3590-3596, 4032-4039, 8748-8757.)

At the hearings before the Congressional Committees the entire subject of the medicinal use of beverage intoxicants was thoroughly gone into. It is noteworthy that in 1921, although the limitation of prescriptions to one pint in ten days had been in force for two years, not a single doctor appeared before the Committees to complain of the injustice of this limitation or that it did not meet with the approval of the physicians at large. It was in evidence that it was necessary to put some limitation upon prescriptions, because there were a few doctors at least who would greatly abuse the privilege. One physician, it was shown, had used 400 prescription blanks while all the other prescriptions used in his practice amounted to but 10 or 15, and another doctor had used as high as 700 within a comparatively short time when the rest of his practice showed that there were only a few prescriptions issued for normal needs. There was testimony to the effect that out of a total of 152,627 physicians in the country at the time, 78 per cent had failed to take out permits which would allow them to prescribe intoxicating

liquor, and that in 24 States not a single permit had been granted to a physician to prescribe such liquor. (See Hearings before House Judiciary Committee, 67th Congress, on H. R. 5033, Serial 2, pp. 15-16. For evidence upon the necessity of limitation in the laws, see p. 19, last par. Also statement of former Prohibition Commissioner Kramer, p. 146. Also statements by Senator Sterling, p. 3456; Senator Walsh, p. 4035; Senator Willis, p. 4036; Senator Nelson, p. 4038; and Mr. Volstead, pp. 8749-8750; Vol. 61, Cong. Rec., 67th Congress, 1st Session, relative to necessity for limitation.)

Another fact to which Congress gave some consideration was the resolution of the American Medical Association in 1917 disavowing the scientific basis for the use of alcohol and resolving that its use as a therapeutic agent should be discouraged. But this was only one incident in the many opinions and much testimony before the legislative body, and certainly subsequent resolutions by other groups of the American Medical Association softening the effect of the 1917 resolution hardly support the argument for declaring unconstitutional legislation that was passed by Congress as a result of the specific finding that the 1 pint limit of beverage liquor allowed for dosage in a 10-day period was a fair and "wise kind of limitation." (See Senator Walsh in response to questions on the act supplemental to the National Prohibition Act. Congressional Record, 67th Cong., 1st sess., Vol. 61, p. 4036.)

(c) Congress also considered the enforcement experience of the several States, their laws and the Interpretation thereof by State courts.

In legislating for the entire nation Congress adopted a much more liberal policy with reference to the prescription of intoxicating liquors for medicinal purposes than obtained in a majority of the States which had adopted prohibition prior to the ratification of the Eighteenth Amendment. Experience in these States had shown the necessity for strictly regulating the use of intoxicating liquors for medicinal purposes, if the prohibition upon the beverage use was to be made effective.

When the Supplemental Act of 1921 was passed, approximately 40 States had restricted the prescription of beverage intoxicants in some form, and *in more than 30* the restriction was either the same as, or more rigid than, that provided in the Federal law. In eleven states, namely, Arizona, Georgia, Idaho, Kansas, Maine, Nebraska, New Mexico, North Carolina, Utah, Washington, and West Virginia, no intoxicating liquor of any kind could be prescribed. In Colorado the limitation was 4 ounces and in Michigan 8 ounces. In eleven other states, namely, Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee, pure alcohol only could be prescribed. Even in many of these States the amount of pure grain alcohol that could be prescribed was limited. For instance, Alabama, Mississippi, and South Carolina limited the amount to one-half pint,

and Florida to 8 ounces. Some limited the amount of medicated alcohol that could be prescribed in medicines. The statute of Utah, for instance, made it unlawful "to prescribe any medicine containing in total content of such prescription more than 4 ounces of alcohol and such prescription shall not be refilled within seven days." All the above States, with the exception of Delaware, had adopted prohibition prior to the National Constitutional Prohibition. Congress here saw that the States which had been under prohibition for the longest period and so necessarily had the greatest experience to draw upon, such as, Maine, dry since 1851, and Kansas, dry since 1880, had found it necessary to limit or prohibit entirely the medicinal use of beverage liquors.

Attached to this brief will be found Appendix "A" giving a summary of the statutes of the various States at the time Congress was considering the act supplemental to the National Prohibition Act. Some changes have since taken place.

In Appendix "B" also will be found numerous decisions in the State courts showing the interpretation of these State statutes which restricted the prescription of spirituous liquors and which were similar in form to the restrictions adopted by Congress.

In view of the complexity of the problem facing Congress when it attempted to restrict or prohibit in the field of nonbeverage use of alcohol and beverage liquors, and the exhaustive hearings conducted by committees of Congress to ascertain so far as possible the scientific facts, it is manifest that Congress

adopted the limitation on the prescription of intoxicating liquor to a pint in a 10-day period as a result of the finding of fact made by it in that such restriction was necessary to keep alcohol when dispensed in palatable beverage form within the proper non-beverage constitutional uses; and it is further manifest that Congress did this in the light of experience had in the various States, that it intended to adopt the result of that experience and therefore passed this legislation with the same intent and purpose that had been manifested by State courts when interpreting similar provisions in State statutes and constitutions.

III

THERE IS NO RIGHT TO PRACTICE MEDICINE WHICH IS NOT SUBORDINATE TO THE POLICE POWER

As observed by this and other courts in a long line of cases, no inherent right exists to practice medicine that does not yield to the needs of the State in the fair exercise of its police power. The States delegated to the Federal Government police power over intoxicating liquor. Congress decided that mere regulation was not adequate to prevent the beverage use of liquors prescribed by physicians. The experience of the several States demonstrated this fact. Congress recognized State experience and in the exercise of its police power followed the lead of the States. Where there is conflict over the form in which a physician wishes to administer alcohol, the physician must yield to such requirements as "the lawful

authority deems necessary." *Gray v. Connecticut*, 159 U. S. 74. See also:

Dent v. West Virginia, 129 U. S. 114.

Watson v. Maryland, 218 U. S. 173.

Reetz v. Michigan, 188 U. S. 505.

O'Neil v. State, 115 Tenn. 427.

State v. Davis, 194 Mo. 485.

State v. Rosenkrans, 30 R. I. 374.

State v. Edmunds, 127 Iowa, 333.

IV

LEGISLATIVE ACTS ARE PRESUMED CONSTITUTIONAL

Elaborate reasoning has been marshalled in this case to support the theory upon which appellant's case rests that Congress in limiting the use of beverage liquors as a medicine has exceeded its constitutional power. This structure of argument falls before the clear statement of the rule in *Interstate, Etc., Railway Company v. Massachusetts*, 207 U. S. 79, where on page 88 of the opinion Mr. Justice Holmes says:

It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

And again, the other complaint that regulation upon physicians in the medicinal use of beverage liquor to a greater degree than that placed upon the clergy in the sacramental use of beverage liquor is unwise and unnecessary and an abuse of the power of Congress, is met by this Court's statement in *Hamil-*

ton v. Kentucky Distilleries, 251 U. S. 146, quoting from page 161 of the opinion:

No principle of our constitutional law is more firmly established than that this Court may not, in passing upon the validity of a statute, inquire into the motives of Congress * * * nor may the Court inquire into the wisdom of the legislation * * * nor may it pass upon the necessity for the exercise of power possessed, since the possible abuse of a power is not an argument against its existence.

CONCLUSION

In conclusion it is respectfully urged that the limitation placed upon physicians in prescribing beverage liquors is a fair exercise of the police power delegated to Congress under the Eighteenth Amendment; that the legislation was, after due consideration, deemed necessary, and in enacting it "Congress has affirmed its validity," and that this Court "by an unbroken line of decisions" has "steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond rational doubt." (*Everard's Breweries case, supra*, p. 560.)

The wide diversity of views on the part of the medical profession shows that it was practically impossible for Congress to obtain any uniform opinion as to how much liquor should be allowed. There was abundant respectable opinion for eliminating alcoholic liquor entirely. Congress extended the privilege, however, as far as it thought safe, without

limit, in medical prescriptions, if the physician used alcohol, and restricted it when he chose beverage liquors; and in placing the limitation upon the latter, we submit Congress did not exceed its legislative discretion, nor did it unduly hamper a physician in administering alcoholic therapeutics; for, as pertinently stated in *Price v. Russell* (U. S. Dist. Court, Nor. Dist. of Ohio), 296 Fed. 263, 267:

The Pharmacopeia and the National Formulary which have statutory approval in Section 4 of Title II of the Act, as well as common experience, instruct the physician in the compounding of a beverage intoxicating liquor with an ingredient, subject to his selection as innocuous in the specific case, which will deprive the result of palatability. Thus will his administration be taken beyond the scope of the law. We see nothing in the law which prevents resort to this expedient when alcoholic stimulant is indicated to the physician's judgment beyond the limitation of a half pint within 10 days. This compounding may be done, as the profession knows, and it is also known to intelligent laymen, without deterioration of the expected therapeutic effect of the administration, except in those rare and negligible cases where the palate is to be tickled as part of the treatment, and these Congress seems to have provided for in section 6, where medical attention to such appetites is legislatively considered.

The statutes in question did not exceed the powers delegated to Congress by the Eighteenth Amendment; they have a real and substantial relation to prohibition enforcement, and deprive appellant of no fundamental rights. The decree appealed from should, therefore, be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,

Solicitor General.

MABEL WALKER WILLEBRANDT,

Assistant Attorney General.

MAHLON D. KIEFER,

Senior Attorney.

APRIL, 1926.

APPENDIX A

A BRIEF SUMMARY OF THE PROVISIONS OF LAWS RELATING TO THE PRESCRIPTION OF INTOXICATING LIQUOR IN FORCE IN THE SEVERAL STATES AT THE TIME OF THE ENACTMENT OF THE SUPPLEMENTAL ACT.

ALABAMA

Pure alcohol only may be prescribed in a quantity not to exceed one-half pint upon a single prescription. Physicians desiring to prescribe alcohol must make affidavit before the judge of the probate court of the county in which said physician practices, stating that he is a duly licensed practitioner and that he will prescribe alcohol in accordance with the provisions of the law which are set forth in the affidavit required to be filed. For this a fee of twenty-five cents is allowed the clerk receiving the affidavit. Prescriptions must be written in accordance with a form prescribed by statute. They must contain the name and address of the physician, the name and address of the patient, the date of issuance, and the number of like prescriptions written for the patient within the preceding twelve months, the disease or malady from which the patient is suffering, and set forth the quantities of dose and method of use or administration. Such prescriptions may be issued only after an actual examination of the patient and a copy signed by the physician must be immediately filed with the probate judge who shall preserve the same and deliver all such prescriptions to the next grand jury for examination. (Act of 1919, No. 7, secs. 5, 6, and 7.)

ARIZONA

There is no provision for the sale of intoxicating liquor or alcohol as a medicine either upon prescription or otherwise except that extracts, remedies, etc., which do not contain more alcohol than is necessary for the legitimate purposes of extraction, solution, or preservation and which contain drugs in sufficient quantity to medicate such compounds and which are sold for legitimate and lawful purposes, may be manufactured and sold. (Laws 1917, Chap. 63, Sec. 2.)

ARKANSAS

A physician may prescribe alcohol only to the sick under his charge when he may deem the same necessary, but before issuing any prescriptions the physician must file with the clerk of the county in which he resides an affidavit certifying that he will not prescribe or furnish any alcohol to any one except when in his judgment it is necessary treatment of the disease with which the patient is at the time afflicted. (Secs. 6028-6029 of Code and Amendments of 1919, Chap. 87, Sec. 17.)

CALIFORNIA

The enforcement code passed by the Legislature in 1911, known as the Wright Act (St. 1921, p. 79), adopts the Volstead Act by reference. It was approved by the voters upon referendum at the election November 7, 1922. Sustained by the Supreme Court of California in *Ex parte Burke*, decided January 9, 1923.

COLORADO

Registered physicians may prescribe intoxicating liquor to an amount not to exceed four ounces on numbered forms furnished by the Secretary of State and when issued shall be signed by the physician, giving his true, full name, address, date and hour of issuance, and shall state particularly the disease or malady for which prescribed, and true name and address of the patient and the number and date of previous prescriptions to such persons within the year next preceding. The prescription must be filled within forty-eight hours of its issuance. Only one sale may be made on a single prescription and the pharmacist filling the same must preserve them open to public inspection for at least two years. (Chap. 98, Laws 1915 as amended by Chap. 82, Laws 1917.)

CONNECTICUT

Every physician holding a permit from the United States Government to prescribe spirituous and intoxicating liquors may do so. Penalty for violating the provision of the act. (Acts 1921, Chap. 291, Sec. 4, p. 3277.)

DELAWARE

Physicians must be in good standing in their profession and not addicted to the use of intoxicating liquor or drugs. Must personally make careful examination of the person for whom prescribed. May prescribe pure grain or ethyl alcohol only and copy of prescription must be pasted upon bottle. (Act of 1919, Chapter 239, Secs. 4, 8, and 14.)

FLORIDA

A physician regularly licensed to practice his profession by the State Board of Medical Examiners may prescribe pure alcohol in quantities not exceeding eight ounces at any time for medicinal purposes. To write the prescription the physician must have either a professional knowledge of the case or have made an actual examination of the patient. Prescriptions must be written in substantial compliance with a form set forth in the statutes, can be filled only by pharmacists regularly licensed under the laws of the State, only upon the day of issuance or next succeeding day. Can not be refilled, nor can any one person have more than one such prescription filled in any one day. The prescriptions are required to be preserved as a record by the druggist subject to inspection by officers charged with the enforcement of the law. (Act of 1919, Chap. 7890 (No. 108), p. 238, amending Sec. 5 of Chap. 7736, Acts of 1918; Extra Session.)

GEORGIA

Pure alcohol may be prescribed, but alcohol so prescribed must be so medicated as to render it absolutely unfit for use as a beverage. When dispensed upon prescription the druggist will be held absolutely responsible as to the sufficiency of the medication. (Laws 1919, No. 139, Sec. 4, p. 123.)

IDAHO

There seems to be no provision for prescribing alcohol or liquor in any form for medicinal use. Pharmacists wanting a permit may procure it for compounding medicine, but no provision for prescription as a medicine either in Laws of 1915, Chap.

11, or Laws 1921, Chap. 50, regulating purchase and transportation of alcohol. The later act provides that physicians may purchase for manufacturing, laboratory, or scientific purposes only pure alcohol upon the execution of a verified requisition in quadruplicate before the probate judge of the county upon a form to be furnished by the Secretary of State at cost.

ILLINOIS

Physicians upon obtaining a permit granted by the Attorney General may prescribe liquor except wine, beer, or alcoholic malt liquor after careful physical examination of the patient, in a quantity not to exceed one pint for the same patient within a period of ten days. Such prescriptions can not be refilled. Physicians issuing such prescriptions must keep an alphabetically arranged book to be supplied by the officer issuing the permit which shall show the date of issuance of each prescription, amount prescribed, to whom issued, the purpose or ailment for which issued, and directions for its use, stating the amount and frequency of the dose. (Laws, 1921, Chap. 43, Sec. 8.)

INDIANA

Licensed physicians may prescribe grain or ethyl alcohol only for medicinal purposes. The prescription must contain the name and address of the physician, the kind and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written, and directions for the use of the liquor as prescribed. (Laws, 1917, Chap. 4., Sec. 13, as amended by Laws, 1921, Secs. 2 and 3.)

IOWA

Physicians may procure intoxicating liquor, not including malt liquors, and dispense the same to patients actually sick. They may purchase such liquor from pharmacists who hold a permit from the county auditor authorizing them to sell liquor for medicinal purposes. Citizens not addicted to the use of liquor may purchase liquor for medicinal purposes from pharmacists holding permits to sell for such purposes by making an application to purchase upon a blank required to be kept by permit holders supplied by the county auditor. This request must show the applicant not a minor, must give name, residence, and street number, the amount required and for what use desired. The applicant must be personally known to the permit holder or identified by a subscribing witness to the application.

There appear to be no statutory requirements relative to prescriptions, but the Commissioners of Pharmacy of the State are empowered to make rules and regulations to carry into effect the law. (Code of 1913, Secs. 2386, 2395, and 2401.)

KANSAS

Under Section 5499 of the General Statutes of 1915 wholesalers may sell alcohol to retail druggists for medicinal purposes in quantities of not less than one nor more than five gallons. Also the Bone Dry Act, Chapter 215, Laws of 1917, page 283 contains a similar provision but the retailer must file with the carrier and with the County Clerk a statement showing the date, the quantity, and for what purpose such alcohol is to be used. The statement to the Clerk must be filed within

ten days after delivery. Hospitals may procure alcohol upon the same conditions. There is no provision for the sale of medicinal liquor at retail upon prescription.

KENTUCKY

Physicians may issue and pharmacists may fill prescriptions for intoxicating liquors, under the restrictions of the National Federal law. Every physician who issued prescriptions under the Act shall keep duplicates on file in alphabetical order in his office for two years after the date thereof, to be open to the inspection of the County attorney and Commonwealth attorney of the district. The prescription shall state the name and address of the patient, the druggists to whom addressed; the amount required; that the physician is in personal attendance; that the liquor is necessary in the proper treatment of the ailment and shall show the date and name and address of the physician. (Act of June 30, 1920, Sec. 23, Sec. 2554A, 23 Carrolls Kentucky Statute.)

LOUISIANA

Laws 1921, Act No. 39, for enforcing 18th Amendment, contains no provisions relative to prescribing liquor. State governed by Federal law.

MAINE

There is no provision for the sale of medicinal liquor upon prescription. The Code of 1916, Chap. 20, Sec. 17, makes it unlawful for apothecaries to sell intoxicating liquor.

MARYLAND

No general State provision. (Local option laws certain counties.)

MASSACHUSETTS

No general provisions. In some local option territories pharmacists may sell liquors upon prescription. (Sup. Rev. L., p. 770.)

MICHIGAN

Any physician lawfully practicing in the State may prescribe intoxicating liquors not to exceed eight ounces. The prescription must state the name and address of the patient, full directions for taking or using, the number of prescriptions the physician has given to the patient within the year preceding and that after a special diagnosis that the physician is satisfied that the intoxicating liquors were necessary to the health of the patient. (Acts 1919, No. 53, Sec. 19.)

MINNESOTA

Physicians may prescribe intoxicating liquor not exceeding one pint in ten days for the same patient. The prescription must be written in ink, printed or typewritten. It must state the name and address of the patient, the kind and quantity of liquor, directions for its use and that the illness for which the liquor is prescribed requires its use. The prescription must be signed in ink and show the date of its issuance and delivery. A prescription can not be filled after ten days from the date of its issuance and can not be refilled. (Laws 1919, Chap. 455, as amend., Laws 1919, Ex. Sess., Chap. 65, and Laws 1921, Sec. 7.)

MISSISSIPPI

Physicians may prescribe pure alcohol in quantities not exceeding one-half pint. The prescription must be written in substantial compliance with a form provided by law. It must be filled the day of issuance or the following day and can not be refilled. The physician must make an actual examination of the patient. The pharmacist is required to preserve prescriptions for alcohol and file them at the end of each month with the Clerk of the Circuit Court. (Laws 1908, Chap. 113, Sec. 3.)

MISSOURI

No limitation. Laws of 1919, p. 408.

MONTANA

Physicians regularly licensed, holding permits from the Federal government to prescribe liquor as a medicine may record such permit with the Secretary of State of Montana upon the payment of \$2.00. This officer is required to countersign the permit or a certified copy and keep a record thereof whereupon the physician may prescribe not more than one pint of spirituous liquors to be taken internally for use by the same person within a period of ten days. The prescribing of malt liquors containing in excess of one-half of one per centum of alcohol by volume is expressly forbidden. Such prescriptions can be written only after a careful physical examination, or if such examination is found impracticable, then upon the best information obtainable and if the physician in good faith believes that the use of liquor as a medicine by such person is necessary. (Laws 1919, Ex. Sess., Sec. 6.)

NEBRASKA

Regularly licensed physicians may issue prescriptions requiring the use of intoxicating liquors for his own patients provided the other ingredients with which it is mixed or compounded are of such character, and used in such quantities as to render the same unfit for use as a beverage. All such prescriptions shall be on numbered forms, furnished, dated, and signed by the physician issuing, stating specifically the ingredients and the liquor and giving the name of the person for whom the prescription is issued. The pharmacist filling such prescriptions must preserve them as a record subject to inspection by the county attorney and the governor. (Acts of 1917, Chap. 187, Sec. 25.)

NEVADA

Prescription limited to pure grain alcohol. Sec. 4. Law December 16, 1918.

NEW HAMPSHIRE

Physicians may prescribe intoxicating liquor. The prescription may be written in accordance with a form prescribed by law. The prescription must show the name of the patient, the quantity of liquor, the kind, and give directions as to the amount and frequency of the dose. Such prescriptions must be written only after diagnosis of the disease, exercising the same professional skill and care as on prescribing any poisonous or habit-forming drug. The pharmacist filling the same must purchase such medicinal liquor from the State liquor agent who is made responsible for the quality of the liquor supplied to druggists. The druggist must also keep a record

in which the person having the prescription filled must sign, giving his residence address. This record and the prescriptions must be kept open to inspection by enforcement officers. (Laws 1919, Chap. 147, Secs. 2, 10, and 12.)

NEW JERSEY

Physicians in active practice in the State holding permits from the Federal Government may have the same countersigned by the county clerk, whereupon he may prescribe liquor for medicinal purposes, upon compliance with the provisions of the Federal law. (Session Laws 1921, Chap. 150, Secs. 20-b, 28, 29, 44, and 45.)

NEW MEXICO

Pure grain alcohol only may be sold for medicinal use. Article XXIII amending State Constitution and Chapter 16, Laws 1920.

NEW YORK

Mullan-Gage Law 1921, Chap. 155, Sec. 1214. Same restrictions as in Federal Act.

NORTH CAROLINA

Act 1908 allowed all grain alcohol only to be used in compounding, mixing, or preserving medicines or for surgical purposes. Sec. 8 That all laws authorizing or allowing the sale of spirituous, vinous, or malt liquors or intoxicating bitters by any medical depository, druggist, or pharmacist be, and the same are hereby repealed, and it shall be unlawful for any medical depository, druggist, or pharmacist to sell or otherwise dispose of for gain any spirituous, vinous, fermented, or malt liquors or intoxicating liquors. (Law April 1, 1915, Secs. 8 and 9.)

NORTH DAKOTA

No person shall within this state manufacture, sell, barter, transport, import, deliver, export, or furnish any intoxicating liquor or possess the same except as permitted by federal statute. All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. *Provided* that pure grain or ethyl alcohol for nonbeverage purposes, wine for sacramental purposes; denatured alcohol or denatured rum; medical preparations that are unfit for beverage purposes; patented, patent and proprietary medicines that are unfit for beverage purposes; toilet, medical, and antiseptic preparations and solutions that are unfit for beverage purposes; flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes; or vinegar or sweet cider may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed when permitted by Federal statute. (Law of February 18, 1921, Sec. 2.)

OHIO

A physician holding a Federal permit may within ten days of the receipt thereof file a copy with the Commissioner of Prohibition of Ohio, who is required to keep an indexed record of such permit holders. Thereupon such physician may prescribe pure grain or ethyl alcohol or spirituous liquors in quantities not to exceed one-half pint in any period of ten days, for the aged, infirm, and known sick. (Laws 1921, Secs. 6212-15-2 and 6212-15-b.)

OKLAHOMA

Pure grain alcohol only may be prescribed for medicinal purposes. The governor is authorized to prescribe rules and regulations governing its sale. (Session Laws of 1911 as amended by Laws 1913, Chap. 70, Sec. 1; Comp. St. 1921, Sec. 6982.)

OREGON

Physicians may prescribe ethyl alcohol only upon prescription, if a licensed physician in good standing, actually engaged in the practice of his profession. The prescription must be dated the actual date of issuance. They must be numbered consecutively during each calendar month, the number of each prescription to appear plainly upon its face. It must show the general nature of the ailment, the name and address of the patient and of the physician, and must be written in duplicate and on or before the tenth of each calendar month carbon copies must be filed with the clerk of the county, of all prescriptions issued during the month, together with an affidavit certifying that the prescriptions filed constitute a full report of all alcohol prescribed during the month. Provision is also made whereby the physician may procure and administer alcohol to patients in certain cases, but not to be sold by such physician. (General Laws 1917, Chap. 40, Sec. 2.)

PENNSYLVANIA

No provisions of State law.

RHODE ISLAND

No physician shall prescribe except upon obtaining a Federal permit. (Acts 1922, Chap. 2231, Sec. 4.)

SOUTH CAROLINA

Pure alcohol only may be prescribed in quantities not exceeding one-half pint. The physician must write his prescription in substantial compliance with a form set forth in the statute. Such physician must be a regular practicing physician of the State. He must make an actual examination of the patient and may prescribe alcohol only when in his professional judgment the use of such alcohol is absolutely necessary to alleviate or cure the disease from which the patient is suffering. Such prescription can be filled only upon the day of issuance or the following day and may not be refilled nor can they be filled at any drug store in which the physician is financially interested. The alcohol can be delivered by the druggist only to the patient or to someone authorized by the physician to receive it, except in the case of minors, in which event it may be delivered to the parent or guardian of such minor. Prescriptions must be preserved by the druggist, recorded, and indexed, and at the end of each calendar month filed with clerk of the court of the county in which such drug store is located. The record and prescriptions are required to be kept subject to inspection by the enforcement officers. (Criminal Code of 1921, Secs. 797, 798, and 802.)

SOUTH DAKOTA

Physicians in active practice, of good moral character, may make application to the State Sheriff for a permit to prescribe spirituous or vinous liquors. That officer may in his discretion grant such permit upon the payment of a fee of one dollar. For violation of the terms of the permit the State Sheriff may revoke such permit in which event the physician may,

appeal to the appeal board, consisting of the Governor, Attorney General, and State Sheriff. (Sec. 10255, Revised Code of 1919.) Prescriptions for spirituous and vinous liquor must be written in ink, indelible pencil, or on a typewriter, shall be signed by the physician, and shall have on it the number of the physician's permit, the date of issuance, the name of the patient, that it is needed for actual sickness, the name of the ailment or disease, the kind and quantity of liquor prescribed, the dose, the number of prescriptions written for the same patient, and the total amount prescribed during the preceding three months. The physician must retain a carbon duplicate and on the original must stamp the word "Original" and upon the carbon the word "Copy." Each prescription must be in numerical order, and the number on the carbon must correspond with that on the original. The physician must also keep a record of such prescriptions showing the name and residence of the patient, the date filled, the kind of liquor prescribed, the quantity, the disease, and total quantity prescribed by him for such patient during the preceding three months. This record to be open to inspection during business hours by enforcement officials. On or before the 5th of each month duplicate copies of this record with the carbon copies of the prescriptions, together with an affidavit certifying the same constitute a true, full, and correct statement of all prescriptions issuing during the month, must be filed with the county auditor, who shall file one record in his office and forward them to the State Sheriff. (Revised Code of 1919, Secs. 10273, 10274, and 10275.)

TENNESSEE

Physicians of good standing actually engaged in the practice of the profession and not of intemperate habits may prescribe alcohol only in quantities not exceeding one pint for medicinal use. Such prescriptions may not be filled after three days of the date of issuance, must be written in triplicate, contain the name of the patient, the address, directions for use, must be signed by the physician, and give his address. The physician is required to keep one copy of such prescription for a period of two years and on or before the eighth day of each month must mail one copy of all such prescriptions issued by him during the previous calendar month to the Pure Food and Drug Department of the State. The druggist is also required to keep a record of all such prescriptions filled. Such records are to be kept open to the inspection of enforcement officers. (Laws 1917, Chap. 68, Secs. 4, 5 and 6.)

TEXAS

Physicians may prescribe pure alcohol only in quantities not exceeding one pint. In order to do so the physicians must secure a permit from the Comptroller of Public Accounts for which a fee of five dollars is charged. That officer is required to furnish at cost to the physician the necessary prescriptions and record books. The prescriptions are required to be in book form numbered serially from one to one hundred and each book to be given a number with a stub carrying the corresponding number and data as the prescription bearing that number. The book containing the copy of such stub must be returned to the Comptroller of Public Accounts

along with all defaced blanks written six months after the date of delivery of such book. Physicians must make a careful, personal, physical examination of the patient before issuing such a prescription, which is valid only when written upon the prescribed form. No such prescription may be filled at any drug store in which such physician has any financial interest. Physicians issuing prescriptions for alcohol must preserve a record of such prescriptions, a copy of which record must be filed with the Comptroller of Accounts not later than the fifth day of the month for the quarter preceding. (Act 1919, 36 Legislature 2nd Called Session, Chap. 78, Sec. 13, 14 and 19; Penal Code 1920. Chap. 6-A.)

UTAH

No physician may prescribe any compound containing in excess of one-half of one per centum of alcohol by volume which is capable of being used as a beverage, or prescribe any medicine containing total content of such prescription more than four ounces of alcohol and such prescription may not be refilled within seven days. (Sec. 3370 Comp. Laws of 1917, p. 687, being Sec. 30 of laws of 1917, Chap. 2.)

VERMONT

Provides that physicians holding permits from the Federal Government to prescribe liquor for medicinal use may within ten days of the receipt of such permit file a copy thereof with the Secretary of State whereupon such physician may prescribe liquor as a medicine upon the limitation of the Federal Law. (Secs. 4 and 5, Session Laws 1921, No. 204.)

VIRGINIA

Under the State law physician prescribes not exceeding two quarts of alcohol, or one gallon of malt or vinous liquors, or one quart of brandy or whiskey. (Acts of 1918, Chap. 388, Secs. 8-c 13.)

WASHINGTON

No provision made for the issuance of prescriptions for intoxicating liquors or alcohol. Licensed physicians may procure alcohol upon securing a permit from the county auditor and may administer the same to their patients, but it is unlawful for a physician to administer diluted alcohol or adulterated alcohol, or alcohol compounded with any other substance, in such proportion that it shall be capable of being used as a beverage and no prescription can be issued for alcohol to be diluted or adulterated or compounded with any other substance in such proportions that it shall be capable of being used as a beverage. (Sec. 2, Sessions Laws of 1917, Chap. 19.)

WEST VIRGINIA

The law of 1921 provides for the sale by druggists through pharmacists of pure grain alcohol for medicinal purposes and provides that physicians may use the same in the practice of their profession subject to the provisions of the Federal law and the regulations issued thereunder. (Act of May 2, 1917.)

WISCONSIN

Physicians may prescribe intoxicating liquor upon the condition and limitation of the Federal law provided such physician shall make application to the State Prohibition Commissioner and obtain a permit for which a fee of ten dollars is charged to be paid into the general fund of the State Treasury. (Laws 1921, Secs. 7-b and 9.)

WYOMING

Physicians may prescribe spirituous liquors to be taken internally in quantities not exceeding one pint for the same patient within a period of ten days. The physician must make application to the State Commissioner of Law Enforcement and obtain a permit to prescribe, which permits are in force for a period of one year unless revoked for violation of the law. The physician must make a careful physical examination of the patient, or if this is found impracticable, then upon the best information obtainable, if he in good faith believes that the use of liquor by such patient as a medicine is necessary and will afford relief for some known ailment he may issue such a prescription. The physician must keep a record alphabetically arranged of all prescriptions for liquor. Laws of 1921, Chap. 117, Secs. 5, 6, and 7. Language same as that of original Volstead Act would probably receive same construction. (See 32 Op. Att. Gen. 467.)

APPENDIX B

STATE COURT DECISIONS INTERPRETING STATE STATUTES LIMITING PHYSICIANS' RIGHT TO PRESCRIBE BEVERAGE LIQUOR

There are numerous decisions by State courts upholding the constitutionality of rigorous restrictions upon prescriptions of beverage intoxicants. Indeed, the successive statutes in the experienced prohibition States are conclusive proof not only of the existence of the power and the approval by State courts of its use, but of the absolute necessity of its exercise if the prohibition against the use of liquors as a beverage is to be made effective.

KANSAS

An instance of this is to be found in the statute of the State of Kansas. In this State the original prohibition law (Laws of 1881, Ch. 128, Sec. 1) provides:

Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided: *Provided, however*, that such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act.

The Constitution of Kansas (Art. 15, Sec. 10) is similar to the Eighteenth Amendment and prohibits the "manufacture and sale of intoxicating liquors * * * except for medical, scientific, and mechanical purposes."

In 1909 by Sections 1 to 4 of Ch. 164 of the General Statutes the prohibition law was amended and the exceptions in favor of the sale of intoxicating liquor for scientific, mechanical, and medical purposes were eliminated.

By Chapter 178 of the Laws of 1911 the Act was further amended to provide that wholesale druggists of a certain class might sell alcohol for medicinal, scientific, and mechanical purposes to registered pharmacists in good faith in the retail drug business in quantities of not less than one gallon and not more than five gallons.

This statute was assailed on the ground that the legislature had no power to prohibit the use of intoxicating liquors for medicinal purposes when the Constitution provided that it might be used for such purposes.

In *State v. Weiss*, 84 Kansas, 165 (decided 1911), this statute was declared to be constitutional, the court saying (p. 166):

It is argued that the constitutional prohibition * * * is equivalent to a mandate directing the legislature not to interfere with such manufacture and sale for the three excepted purposes. But we regard the amendment as a prohibition upon personal conduct, not upon legislative action.

See also *State v. Miller*, 92 Kans. 994 (decided 1914), where the court said (pp. 1000-1003):

In 1909 the legislature passed a new act which extended the prohibition of the law to the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes, and which superseded the old definition of intoxicating liquors. * * *

In 1909 the small remedial value of alcoholic stimulants as compared with the former popular notion regarding their curative properties had been established. The pathway to inebriety through the use of patent and other medicines, consisting of intoxicating liquor containing some barks or drugs or roots or seeds

having more or less medicinal property, had been unmasked * * *. None of the social disasters which had been predicted as results of the law of 1881 had befallen the State. Fear lest the law might be brought into disrepute by encroachment on the right to use preparations containing alcohol was no longer entertained. Nearly thirty years' experience disclosed that restraints, which year by year had been continually imposed and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome and were approved by public sentiment.

In 1917, Kansas enacted the Bone Dry Law, so called, which prohibits the sale of anything except alcohol for medicinal purposes and limits such sales to druggists, hospitals, and institutions authorized to receive them. No provision is made for dispensing upon prescription.

This Act was again declared constitutional in *State v. Macek*, 104 Kans. 742, where the court in rather enthusiastic language said (pp. 745-746):

We come, then, to the last and only serious question in this lawsuit—the constitutionality of the “bone-dry” law. Appellant says that it is unconstitutional and void, and cites many a respectable authority and precedent from Blackstone’s time down to yesterday to that effect. But they all stop yesterday. The times change. Men change, and their opinions change; their notions of right and wrong change. The United States, its government and people, have come a long, long way since the Washingtonian society was organized in 1840 to combat intemperance. A whole generation of Americans has been born and educated, and has grown to maturity and taken its dominant place in the electorate

and in official life, since instruction in the evil effects of intoxicants upon the human system became compulsory in our public schools. (Laws 1885, ch. 169; Gen. Stat. 1915, Sec. 9034.) That is the leaven which has leavened the whole lump. "Learn young, learn fair," is an old adage whose efficacy was never better proved than in the practical annihilation of the liquor traffic by the unnoticed, but persistent, work of the public schools for the last thirty years. While we of an earlier generation continued to argue the pros and cons of the liquor traffic, and the wisdom, or folly, or impossibility, of suppressing the sale and use of intoxicants, a generation arrived which will have none of it; that generation has said so as clearly and emphatically as the American people ever voiced their determination on any subject since 1776. (XVIII amendment to U. S. Const.) And because of the ease with which the law prohibiting sales, etc., of liquor may be violated and the difficulty of procuring evidence of such violation, the legislature in 1917 (Laws 1917, ch. 215) decreed that the mere possession of intoxicants, or knowingly to permit them to be kept on one's premises, should be unlawful. Any legislature sincerely determined to suppress the sale of liquor and to suppress the keeping of tippling nuisances, would be strongly persuaded to go the final step of forbidding the mere possession of intoxicants; otherwise its laws forbidding liquor sales and the existence of drinking dens would be bound to be somewhat ineffective. The whole matter is one of public policy. And the public policy of a state must largely be shaped by legislation. No federal or state constitutional inhibition was violated in the enactment of the "bone-dry" law, all of yesterday's juristic dissertations and precedents to the contrary notwithstanding.

That the regulation and prohibition of the use of intoxicating liquors for medicinal purposes has a substantial relation to the prohibition of intoxicants for beverage purposes and is within the constitutional powers of a State under a constitutional provision similar to the one here in question, seems moreover to have been directly decided in the case of *State v. Durein*, 70 Kans. 1, affirmed 208 U. S. 613. In that case there was a conviction under the prohibition laws of the State for maintaining a nuisance. The court said (pp. 11-13):

The constitutionality of the law regulating the sale of intoxicating liquor in this State is assailed, and the argument is made that the sale of liquors for medical, mechanical, and scientific purposes is a lawful and virtuous business, necessary for the welfare of the community; that permits to carry on such business must, therefore, be obtainable as a matter of right; that the statute gives to probate judges an arbitrary and unrestrained authority to refuse permits for such purposes; that the vesting of such power in probate judges renders the statute void, and hence that no one can be punished for selling liquors without a permit. The opinion of the supreme court of the United States in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, effectually disposes of this argument. Mr. Justice Harlan there shows, both by reason and upon authority, that the right to manufacture, sell, and use articles of trade is conditioned upon the fact that such conduct does not deleteriously affect the rights of the public; that if any business becomes prejudicial to the welfare of the community, society has the right to protect itself against such injurious consequences; that the legislature of the State has the right to determine what measures are

appropriate or needful for the protection of the public morals, health, and safety, and unless a statute has no real or substantial relation to those objects the courts can not interfere. It is then shown that if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple or defeat the effort to guard the community against the evils attending the excessive use of such liquors prohibition may follow. So, if the manufacture and sale of liquors for medical, mechanical, and scientific purposes merely opens the door to the train of evils following upon the general use of intoxicants, they may be prohibited; and *since they may be prohibited, they may be regulated in the manner prescribed by the statutes of this State.* (Italics ours.)

This decision was followed by the subsequent case of *State v. Kurent*, 105 Kans. 13, where the constitutionality of the statute was reaffirmed. It must be borne in mind that this is the status of law in a State where the State constitutional provision reads:

The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes.

TENNESSEE

The Legislature of Tennessee by Acts of 1909, Chap. 10, prohibited the sale of intoxicating liquor as a beverage and prohibited the manufacture of all alcoholic liquor except alcohol of 188 proof. The effect of this statute was to prohibit the manufacture of all liquors except alcohol of 188% proof. No whiskey, beer, wine, or other intoxicants could be manufactured in the State no matter whether in-

tended for medicinal, mechanical, scientific, sacramental or other purposes. The contention was made in the case of *Motlow v. State*, 125 Tenn. 547, that this was an unjust and unreasonable discrimination against the manufacture of liquors designated for nonbeverage use.

The Court held, *inter alia*:

No unconstitutional discrimination is made against local manufacturers in favor of those of other States, by forbidding the manufacture of intoxicating liquors within the State while permitting their sale for certain purposes, although the result is to require those sold to be secured outside the State.

The legislature may constitutionally forbid the manufacture of intoxicating liquors within the State while permitting their sale for medicinal and other nonbeverage purposes.

There is no property right in the manufacture of intoxicating liquors which can not be taken away under the police power of the State, although such liquors are capable of harmless use.

On appeal to this court the case was dismissed, 239 U. S. 653.

RHODE ISLAND

In 1886 Rhode Island adopted an amendment to the Constitution of that State which in its wording was very similar to the language of the Eighteenth Amendment. In the case of *State v. Kane*, 15 R. I. 395, the question of the relation of the amendment to nonbeverage liquor was before the Supreme Court of that State. It was held, quoting from the syllabus:

A constitutional amendment provided, "The manufacture and sale of intoxicating liquors, to be used as a beverage, shall be prohibited.

The General Assembly shall provide by law for carrying this article into effect."

Held, that this constitutional provision did not limit the power which the General Assembly previously had to enact prohibitory laws.

Held, further, that nothing in this constitutional provision gave the right to manufacture and sell intoxicating liquors to be used otherwise than as a beverage.

In construing the second clause of the amendment, which conferred power upon the legislature to make the prohibition effective, the court said (p. 397):

Of course, if the General Assembly had previously had no power to legislate on the subject, this command would confer by implication the power required for its own execution.

While the court recognized that under its police power the state would have had the power to prohibit the sale of liquors for beverage purposes in the absence of a constitutional provision, it was careful to point out that even in the absence of such pre-existing authority where the right was conferred by a constitutional provision *there was conferred by necessary implication the power required for its execution.*

The Supreme Court of Rhode Island reaffirmed this view in the case of *State v. Kennedy*, 16 R. I. 409, where it said:

In *State v. Kane*, 15 R. I. 395, we carefully considered the point here raised, and expressed the opinion that while the fifth amendment to the Constitution, commonly called the prohibitory amendment, makes it obligatory on the General Assembly to enact laws to prevent the sale of intoxicating liquors "to be used as a beverage," it does not take away from the General Assembly, either expressly

or by implication, the power which it previously had to restrict the sale for other purposes to certain persons or classes of persons; but rather, on the contrary, makes it their duty to impose such a restriction, if, by so doing, they can the more effectually prevent the selling and keeping for sale for use as a beverage. We remain of the opinion there expressed.

IDAHO

In the case of *In re Crane*, 27 Idaho, 671, the Supreme Court of Idaho, in construing the law of that State (Sess. Laws 1915, Ch. 11) said (pp. 679-680):

The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above-mentioned, is prohibited.

* * * * *

No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

Again (p. 687):

We have reached the conclusion that this act is not in contravention of sec. 1 of the 14th amendment to the constitution of the United States, nor of sec. 13, art. 1, of the constitution of Idaho that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a reasonable exercise of the police power of the state.

The validity of the statute was sustained by this Court in *Crane v. Campbell*, 245 U. S. 304. After repeating the language of the lower court it pointed out that the only exceptions made to the prohibitions of the statute was in the case of wine to be used for sacramental purposes and pure alcohol to be used for scientific and mechanical purposes or for compounding or preparing medicine. This Court said (pp. 307-308):

It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. * * *

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was

arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

ARIZONA

The constitution of one State, namely, Arizona, as construed by the Supreme Court of that State, prohibits the prescribing of either alcohol or any form of intoxicating liquors. Art. XXIII of the Constitution was construed by the Supreme Court of that State in the case of *Cooper v. State*, 19 Ariz. 486. The court said (p. 487):

The Constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine, and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23, Constitution. It contains no exceptions, as that it may be prescribed and sold as a medicine, or for medicinal purposes. Neither doctors nor druggists, nor anyone else, may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression, and not one of supervision. The fact that ardent spirits are mixed with other ingredients and, as thus compounded, labeled Jamaica ginger and sometimes used for medicinal purposes, does not change the situation.

CALIFORNIA

The entire question of the right to prohibit or regulate the prescribing of liquor for medicinal purposes, including the validity of the provisions of the National Prohibition Act here in question, has recently been the subject of a careful review by the District Court of Appeals in the case of *In re Fixson*, 61 Cal. App. 200 (214 Pac. 677, decided February 28,

1923). This case, a habeas corpus proceeding, involved the validity of the Gandier Ordinance of Los Angeles. This ordinance, enacted prior to the adoption of the Eighteenth Amendment, provided that pharmacists might fill prescriptions for alcoholic liquors in a quantity not exceeding one-half pint upon a single prescription. It was contended that the ordinance, when read in connection with the provisions of the National Prohibition Act, in effect limited the filling of prescriptions for the same patient to 8 ounces (one-half pint) of spirituous or vinous liquors within ten days, whereas the Federal law permitted one pint of such liquors within this period. It was alleged that the ordinance was unconstitutional because in conflict with the Eighteenth and Fourteenth Amendments and the National Prohibition Act. In upholding the validity of the ordinance the court said (pp. 204-206):

Therefore it is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one person, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days, which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, we still do not think that the ordinance has been rendered unreasonable. For reasons presently to be stated, we think that the ordinance would not have been unreasonable and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then,

a fortiori, the limitation to eight ounces in ten days would not have been an unreasonable restriction.

* * * * *

If wine, whiskey, brandy, and the like are useful for medicinal and other nonbeverage purposes, still the evils which flow from their use as a beverage so greatly menace the health, peace, morals, and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines. If experience shows that the sale of intoxicating liquors for medicinal purposes opens the door to that train of evils which admittedly follows upon their general use as beverages, then why may not their use as medicines be absolutely prohibited? That the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety. A city's entire scheme of prohibition might fail if pharmacists were to be permitted to sell alcoholic liquors for medicinal use. And because this is so, the city of Los Angeles, had it deemed it wise and expedient, could have forbidden the sale of such liquors as medicines even though such sales, regarded as separate transactions, might be entirely innocuous.

The fallacy of petitioner's position lies in the assumption that if an article is useful for any purpose its sale can not be wholly forbidden. But notwithstanding an article may be useful for some purposes, its harmfulness to the public from its general use may be so great and widespread and its secret disposition may be so difficult to prevent that the legislature, to protect the public, may absolutely

forbid its manufacture or sale, or both, so as effectually to root out its evil effects altogether.

And again (p. 213):

Concluding, as we do, that the city of Los Angeles, had it chosen to exercise the power, might have prohibited in the first instance all sales of alcoholic liquor as a medicine, it can not be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the national prohibition law that it has now become unreasonable and void.

The case came to this Court on writ of error under the title of *Hixon v. Oakes*, 265 U. S. 254. In dismissing the case this Court said (p. 256):

Neither the Eighteenth Amendment nor the Volstead Act grants the right to sell intoxicating liquors within a State. And certainly nothing in that act lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment.

This Court was careful to point out that its decision was predicated upon the proposition that, notwithstanding that law recognized spirituous liquors as a medicine and the effect of the ordinance and the Volstead Act was to limit the quantity of liquor which could be obtained upon prescription for medicinal purposes to one-half pint within ten days, it did not violate any constitutional right.

The effect of this ordinance as construed by the California court was to recognize spirituous liquors as a medicine but to impose limitations even more restrictive than those provided in the Volstead Act. The action of the California court in sustaining this

legislation as valid under the Eighteenth Amendment was upheld by this Court in denying the writ of habeas corpus on the grounds that no Federal right was violated. The reasoning of this Court in the *Hixon case* is controlling in the instant case. The fact that the *Hixon case* involved a municipal ordinance while the instant case involves a Federal statute to enforce the Eighteenth Amendment in no way alters the result.

